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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

NO. [redacted] 8

BALL BROTHERS COMPANY, FRANK CLAYTON BALL, GEORGE A. BALL, et al., Appellants,

v.

UNITED STATES OF AMERICA, Appellee.

Appeal From the District Court of the United States for the Northern District of Ohio, Western Division.

REPLY BRIEF OF APPELLANTS.

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INDEX.

PAGE

Statement 1

Point I. Ball Brothers and the Ball Defendants occupy a unique position in the present litigation, in that they are alleged to have joined an existing conspiracy by the taking of a license under patents previously sustained by the courts as valid patents, and under which they had been threatened with suit for infringement..... 2

Point II. The Government's contention as to an alleged secret or oral understanding placing limitations on the production of fruit jars by Owens and Hazel-Atlas, is not sustained by the record, when the record is impartially considered in the light of all the circumstances involved 5

Point III. The District Court's order, under which Ball Brothers was compelled to pay $425,000 to the Clerk of the District Court to be impounded and held subject to the further order of said Court, was improper and exceeded the Court's judicial discretion under the circumstances of the present cause 7

Conclusion 12

Table of Cases.

PAGE

Consolidated Edison Co. v. National Labor Relations Board, 305 U. S. 197, 237 11

Daniel v. Ferguson, L. R. 2 Ch. 27 10

Graham v. Railroad Co., 102 U. S. 148, 161 8

Jones v. Security & Exchange Commission, 289 U. S. 1 ..... 7, 10, 12

Hartford-Empire Co. v. Obear-Nester Glass Co., 39 F. (2d) 769 3

Hartford-Empire Co. v. Nivison Weiskopf Co., The Kearns Gorsuch Bottle Co., and The Lamb Glass Co., 58 F. (2d) 701 3

Hartford-Empire Co. v. Hazel-Atlas Glass Co., 59 F. (2d) 399 3

Mellen v. Moline Malleable Iron Co., 131 U. S. 352, 366 7

Standard Oil Company (Indiana) v. United States, 283 U. S. 163, 181-182 4

Wigmore (3 Ed. § 2026) 5

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OCTOBER TERM, 1943

NO. 13.

BALL BROTHERS COMPANY, FRANK CLAYTON BALL, GEORGE A. BALL, et al., Appellants,

v.

UNITED STATES OF AMERICA, Appellee.

Appeal From the District Court of the United States for the Northern District of Ohio, Western Division.

REPLY BRIEF OF APPELLANTS.

STATEMENT.

In reply to Plaintiff's brief, we reassert the contentions heretofore made on behalf of Ball Brothers and Ball Defendants, and we again stress the points we attempted to make in our main brief. For the sake of brevity, we however, limit our reply to the following points:

I. Ball Brothers and the Ball Defendants occupy a unique position in the present litigation, in that they are alleged to have joined an existing con-

spiracy by the taking of a license under patents previously sustained by the courts as valid patents, and under which they had been threatened with suit for infringement.

II. The Government's contention as to an alleged secret or oral understanding placing limitations on the production of fruit jars by Owens and Hazel-Atlas, is not sustained by the record, when the record is impartially considered in the light of all the circumstances involved.

III. The District Court's order, under which Ball Brothers was compelled to pay $425,000 to the Clerk of the District Court to be impounded and held subject to the further order of said Court, was improper and exceeded the Court's judicial discretion under the circumstances of the present cause.

Point I.

We again stress the fact that the complaint in the present case, supplemented by a bill of particulars, alleges that Ball Brothers and the Ball defendants joined a then existing conspiracy by entering into the license agreement (Ex. 199) on March 25, 1933, and by thereby accepting a license under Hartford feeder patents, which had been sustained as valid patents by courts of competent jurisdiction. As to this, we also stress the point that at the time of taking such license, Ball Brothers had long been under threat of suit for infringement of such patents because of its use of feeders, which have been referred to in this case as Ball feeders. That is to say, Ball Brothers used its own feeders, in the face of threats of suit for infringement, and accepted a license under Hartford feeder patents to continue the use of such

feeders only after the so called *"phase-change patent"* and the so called *"stuffing patent"* had been sustained as valid patents. *Hartford-Empire Co. v. Obear-Nester Glass Co.*, 39 F. (2d) 769 (8th C.C.A.); *Hartford-Empire Co. v. Nivison Weiskopf Co., The Kearns Gorsuch Bottle Co.*, and *The Lamb Glass Co.*, 58 F. (2d) 701 (6th C.C.A.); and *Hartford-Empire Co. v. Hazel-Atlas Glass Co.*, 59 F. (2d) 399 (3rd C.C.A.)

While it is true that Ball Brothers acquired a license —in the nature of an exclusive license—under the litigated and other Hartford patents, it is also true that the license so acquired was not unusual either from the standpoint of the rights acquired by Ball Brothers thereunder, or from the standpoint of the conditions imposed upon Ball Brothers as conditions precedent to the granting of the license and also as to Ball Brothers' operations thereunder. As to this license agreement (Ex. 199) we again stress that there is nothing in it which placed Ball Brothers on notice or which even suggested the existence of a conspiracy such as is asserted by the Government in the present case.

In view of all this, it is submitted and contended that the acquisition by Ball Brothers of a license under the Hartford feeder patents, was not such an act as to connect it with a conspiracy, such as is alleged by the complaint in this cause, or as to make it a co-conspirator.

It is also submitted that there is nothing in the record which establishes that the transactions under which Ball Brothers acquired the fruit jar businesses of the Gayner Glass Works, the Knox Companies and the Brockway Company were anything other than inde-

pendent transactions of Ball Brothers, or that they contributed to any existing conspiracy, or that they benefited, or were intended to benefit any of the defendants herein, other than Ball Brothers.

For these reasons, we submit and contend that Ball Brothers' release of Hartford from all obligations as to the so called *residual rights* under the agreement of March 25, 1933 and its release of the Knox Companies and the Brockway Company of their obligations as to the manufacture and sale of fruit jars (the Gayner agreement having expired in 1934), all contribute to the point that Ball Brothers' position in this litigation is unique, and make it apparent that the case of *Standard Oil Company* (Indiana) *v. United States,* 283 U. S., 163, 181-182 does apply to Ball Brothers and the Ball Defendants insofar as it bears on issues rendered moot by the acts of defendants during litigation.

As to this, we call specific attention to the opinion of the trial court in the *Standard Oil* case as reported at 33 F. (2d) 617,630, and note that during the pendency of that litigation, the defendants retracted from their position in connection with some of the matters there involved which were relied upon by the Government in its complaint. The first full paragraph in the first column of page 630 of the report discloses that the Government objected to this move on the part of the defendants and insisted that they should not be permitted to avoid the effect of the litigation *"by an eleventh hour withdrawal from its previously asserted right to thus contract."* As to this, we also note that the trial court said:

> "Were this the only provision objected to, we would view the litigation as happily ended."

This Court upheld the trial court as to this point and refused to consider those issues which were settled by the action of the defendants and even though the withdrawal was accomplished during the pendency of the litigation (*Standard Oil v. United States, supra*).

Point II.

In its effort to sustain its contention that the annual fruit-jar production of Owens and Hazel-Atlas is limited to 100,000 gross and 300,000 respectively by a secret agreement or understanding, the Government relies on the testimony of the witnesses Levis and McNash as to their recollection of a statement made by F. C. Ball while testifying before the T.N.E.C. and the fact that the annual fruit-jar production of the two companies named has, except for one year, remained within the figures above noted, during the period including the years 1933 and 1939. While the fact is stressed by the Government that no objection was made on behalf of any defendant to the above mentioned testimony of the witnesses Levis and McNash, it must be borne in mind that Ball Brothers was willing to introduce into the record of the present case, a transcript of the entire testimony given by F. C. Ball before the T.N.E.C. (see colloquy concerning Ex. 1329 R. 3342 V); that statements such as made by the witnesses Levis and McNash as to isolated portions of the testimony of F. C. Ball do not fulfill the requirements of the rule of evidence as to admissions against interest made while giving testimony in another proceeding (*Wigmore,* 3rd Ed., Sec. 2026); and that fruit-jar shipments decreased during the period including 1933 and 1939. (Ex. 947, R. 13593, XXI).

Accepting the situation as it stands in the record, we urge and contend that the direct and positive testimony of six witnesses, including F. C. Ball, refutes the Government's contention that there was an oral or secret agreement or understanding limiting the production of fruit jars by Owens and by Hazel-Atlas. We also note that the documentary evidence substantiates our contention as to this situation.

As to the testimony of the six witnesses, the Government strongly contends that the findings of the District Court, *"which saw and heard the witnesses"*, should not be set aside upon appeal. As to this, we note that this Court is in the same position as the District Court with relation to the testimony given by F. C. Ball in this case. Because of the physical condition of that witness his testimony was taken by deposition, with the result that the District Court did not have the opportunity of either seeing or hearing the witness.

In view of this, and in view also of the positive statements of all the witnesses that there has never been an agreement or understanding limiting the fruit-jar production of either Owens or Hazel-Atlas, we note that the documentary evidence introduced by plaintiff, and also relied upon by the District Court in reaching its finding No. 383, (R. 7358), merely confirms the admitted fact, viz., that Ball Brothers *initially sought* an agreement limiting the use by both Owens and Hazel-Atlas of Hartford's feeder inventions in the manufacture of fruit jars, and under conditions such that Owens' yearly production would be limited to 100,000 gross and Hazel-Atlas' yearly production would be limited to 300,000 gross, but that Ball Brothers withdrew from this position.

The Court's findings 381 and 382 (R. 7357) also substantiate our contention as to this situation. That is to say, those findings substantiate our contention that Ball Brothers initially asked that limitations be placed on Owens and Hazel-Atlas as to the use of Hartford feeder inventions in the production of fruit jars, but withdrew its request as to this when informed by its counsel that such limitations would constitute a violation of the law. The following exhibits were introduced by the Government: Ex. 189 (R. 12713); Ex. 191 (R. 12717); Ex. 1743 (R. 9509-A); Ex. 1745 (R. 14223); Ex. 1746 (R. 14224) and the following exhibits were introduced by a defendant: Ex. 5316 (R. 4047 VI, 15005 XXV); Ex. 5317 (R. 4049 VI, 15008 XXV); Ex. 5318 (R. 4051 VI, 15012, XXV) and Ex. 5319 (R. 4055 VI, 15015 XXV). When these exhibits are considered together they confirm all of the testimony in the present case and, with that testimony disclose that there never has been an understanding or agreement limiting the production of fruit jars by either Owens or Hazel-Atlas.

Point III.

The Government relies primarily upon two cases in support of its contention concerning the District Court's order under which Ball Brothers was compelled to pay $425,000 to the Clerk of the District Court. The first of these cases is *Mellen v. Moline Malleable Iron Co.*, 131 U. S. 352, 366, and the second is *Jones v. Security & Exchange Commission*, 298 U. S. 1. It is our belief and contention that the holdings in these cases are not applicable to the present case.

The *Mellen* case involves a situation wherein a Court of Equity was called upon to quiet title as to cer-

tain properties of a bankrupt debtor. In the opinion bearing on the situation there under consideration, Mr. Justice Harlan speaking for this Court said (131 U. S. 366):

> "In Graham v. Railroad Company, 102 U. S. 148, 161, this court said that, 'when a corporation became insolvent, it is so far civilly dead that its property may be administered as a trust fund for the benefit of its stockholders and creditors. A court of equity, at the instance of the proper parties, will then make those funds trust funds, which, in other circumstances, are as much the absolute property of the corporation as any man's property is his.'"

With this as a basis, we contend that there is nothing in the Sherman Act or the Clayton Act which has the effect of converting the funds of a solvent corporation into trust funds and even though a civil suit is filed by the Government charging that such corporation has violated the terms and conditions of those acts.

We know of no law, and the Government has cited none, which has the effect of placing a solvent corporation in the position of an insolvent debtor merely because it is named a defendant in a civil suit brought under the Sherman and/or the Clayton Act. We know of no authority which constitutes a basis for the contention that a solvent corporation is deprived of its right to continue to do business and to continue to employ its funds in the transaction of such business, merely because a civil suit is filed against it under the anti-trust acts.

For the sake of brevity and to avoid a search through the record, we note that plaintiff's brief (Br. 384-5) recognizes that Ball Brothers made a claim in 1939 against Hartford for breach of the March 25, 1933

agreement (Ex. 199) and Ex. 1228 (R. 13816 XXI), relied upon by the Government as to this, clearly discloses that the controversy between Ball Brothers and Hartford started at least ten months prior to the filing of the complaint in the present cause.

The last mentioned exhibit is a letter dated January 13, 1939 and addressed by Ball Brothers to F. Goodwin Smith, president of Hartford. This letter involves the payment of royalties by Ball Brothers under the agreement of March 25, 1933, and notes the payment of royalties under protest and contemplates that the license situation between the two companies involved, would be adjusted *in the light of the developments before the Temporary National Economic Committee* during the hearing before that committee in December of 1938.

While the Trial Court's finding 513 (R. 7379 X) does not state the facts to the best advantage of Ball Brothers, nevertheless it discloses that the transaction which involved the payment of $425,000 was one in which Hartford re-acquired from Ball Brothers the so called *residual rights* as to the manufacture of fruit jars; extended Ball Brothers rights to use Hartford's patented inventions in the manufacture of ware other than ware theretofore contemplated by the license agreement; cancelled the clause by which Ball Brothers gave Hartford an option to acquire its feeder patent inventions; and also involved mutual releases from all claims arising out of past representations made by either of the parties to the other, or otherwise arising out of the agreement of March 25, 1933. This finding also discloses that the settlement here outlined was accomplished by the agreement of August 1, 1940 (Ex. 5026).

Thus it is apparent that the record and findings of the District Court constitute a basis for the statement that the reacquiring by Hartford of the so called *residual rights* as to fruit-jar production, was not the only consideration for the payment by Hartford to Ball Brothers of $425,000. The record and those findings also make it clear that the amount so paid became and is now the property of Ball Brothers. We, therefore, submit and contend that the fact still remains that there is nothing in the law involving civil suits under the Sherman Act or the Clayton Act which compels any defendant in such a suit to hold its funds in trust for some future, and undesignated eventuality.

This Court, in deciding the case of *Jones v. Securities and Exchange Commission supra,* stated (beginning page 16):

> "In *Daniel v. Ferguson* L. R. (1891) 2 Ch. 27, suit had been brought to restrain defendant from building so as to darken plaintiff's lights. Notice of motion for a temporary injunction to be made upon a designated future day was served on the defendant. After receiving notice, the defendant put on a large number of men and proceeded with his building, running a wall up to a height of about 39 feet from the ground before the injunction was granted. The Court, without regard to the ultimate rights of the parties, held that the wall thus run up by defendant should be torn down at once, as an attempt to anticipate the order of the Court."

The opinion then refers to several cases of like import and states (page 17):

> "The conclusion to be drawn from all the cases is that after a defendant has been notified of the

pendency of a suit seeking an injunction against him, even though a temporary injunction be not granted, he acts at his peril and subject to the power of the court to restore the status, wholly irrespective of the merits as they may be ultimately decided."

In the present case, the injunction sought by the Government against Ball Brothers was one such as would terminate its enjoyment of the right—in the nature of an exclusive right—as to the use of Hartford's feeder inventions in the manufacture of fruit jars. With this in mind, it will be apparent that nothing has been done by Ball Brothers or by Hartford which deprives the plaintiff of the relief sought in this cause. If Ball Brothers attempted to anticipate the ruling of the Court in this cause, its attempt was in the direction of re-adjusting conditions so as to avoid—as far as possible—a continuation of those things objected to by the Government and referred to in the complaint as activities which should be enjoined. That is to say, there was nothing done by Ball Brothers or Hartford, in connection with this particular situation, which could possibly have the effect of standing in the way of, or preventing the effective fulfillment of any injunction sought by the plaintiff in this cause.

In connection with this point, we also note that the *status* of August 1, 1940 (the date of the so called settlement agreement, exhibit 5026), involved activities by both Ball Brothers and Hartford objected to by the complaint, and which prevented the use of Hartford inventions in the manufacture of fruit jars by any of its licensees except Owens, Hazel-Atlas, Corning, Ball Brothers, Salem Glass and possibly American Thermos Bottle. See *Consolidated Edison Co. v. National Rela-*

tions Board, 305 U. S. 197, 237 (1938) which cites *Jones v. Securities & Exchange Commission supra,* and makes clear that that case does not require restoration of the *status quo* as to "fair contracts" made by the parties during the pendency of the litigation.

The settlement agreement (Ex. 5026) between Ball Brothers and Hartford released the *residual rights* as to the manufacture of fruit jars and enabled Hartford to forthwith extend those rights to all of its other licensees. The record discloses that Hartford acted accordingly, and that all its licensees now enjoy, and have for a period of about three years enjoyed the right to manufacture fruit jars under Hartford patents.

Conclusion.

In conclusion we submit that Ball Brothers' position in the present litigation differs from that of all other defendants. The act of entering into the agreement of March 25, 1933 (Ex. 199) is the act which the Government contends connects Ball Brothers and the Ball defendants with a conspiracy which it alleges was started in 1916 and was in existence in March of 1933. This contention is made even though the record discloses that the agreement in question is a patent license agreement involving patents which had been sustained by courts of competent jurisdiction and under which Ball Brothers had been threatened with suit for infringement.

As to this agreement, we again submit and urge that, so far as Ball Brothers knew, it was confronted with the necessity of making a choice between submitting to suit under patents which had been sustained by the courts as valid patents, or accepting a license under

those patents. That is to say, the act of Ball Brothers, which the plaintiff relies upon as *its overt act* in connection with the alleged conspiracy, was forced upon Ball Brothers by the exigencies of the situation existing in 1933.

It is our contention that Ball Brothers had no real or free choice. It was forced to accept a license under the Hartford feeder patents. In addition, the record fails to disclose that Ball Brothers had any knowledge of those acts and activities of other defendants, which the Government stresses in its effort to establish a conspiracy such as is charged by the complaint. We also note that a large portion of the documentary evidence relied upon by the Government in its effort to sustain its charges as to Ball Brothers, is made up of letters and documents which were introduced in evidence merely for the purpose of showing the state of mind of the individual who wrote or prepared them. We also urge that the Government's charges as to Ball Brothers are, to a large extent, predicated on inference rather than fact. It is for all these reasons we contend and submit that Ball Brothers' position in the present litigation is unique. If, therefore, this Court should conclude that the Government has made out a case against Ball Brothers and/or the Ball Defendants, we submit and urge that it should take into account that Ball Brothers' position in the present litigation is different from that of all other defendants.

We also urge that the testimony, supplemented and reinforced as it is by the documentary evidence in this case, substantiates our contention that there has never been an oral or secret agreement or understanding which in any way involved Ball Brothers and which in any way

limited the production of fruit jars by either Owens or Hazel-Atlas.

We also submit and urge that the plaintiff has failed to justify the action of the District Court in compelling Ball Brothers to pay $425,000 to the Clerk of that Court, and we again urge that the judgment of the District Court should be reversed as to Ball Brothers and the Ball defendants.

Respectfully submitted,

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